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A Response to Professor Dressler

Richard Delgado*

In his reply article,¹ Professor Dressler takes me to task for proposing a defense based, as he sees it, on no more than that the mental state of a defendant is "inculcated by another person."² Such a defense is untenable, Dressler writes, even if limited to cases in which criminal intent is transplanted by force.³ Declaring that "[a]ll ideas and intents originate outside the individual,"⁴ he asserts that the coercive persuasion defense I have proposed "unacceptably blur[s] concepts of moral and legal responsibility."⁵

Dressler's argument constitutes a convincing refutation—but not of my position, for I have not advocated a defense predicated merely on the happenstance of another human being's somehow participating in the formation of the defendant's mens rea. The test is much narrower: Defendants are exculpated only if their behavioral and mentational patterns have been forcibly altered through terror, confinement, physical and psychological debilitation, and assaults on the self.⁶ It must be shown that these forces were applied over extended periods by persons who possessed life-and-death power over their victims and total control of their environment.⁷ Specifically excluded as criminal acts resulting from ordinary solicitation, voluntary membership in a criminal subculture, whole-life conditioning, or simply giving in to temptation.⁸ Dressler is wrong, then, in assuming that the defense would be available to anyone whose acts are influenced, however minimally, by external forces.

Dressler also criticizes my defense because of the qualitative nature of the coercively persuaded defendant's acts. Despite the pressures to which such a defendant may have been subjected, Dressler argues, he retains free choice.⁹ And, "so long as the actor remains free

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1. Dressler, *Professor Delgado's "Brainwashing" Defense: Courting a Determinist Legal System*, 63 MINN. L. REV. 335 (1979).

2. *Id.* at 342-43.

3. *Id.* at 345.

4. *Id.* at 343.

5. *Id.*

6. Delgado, *Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded ("Brainwashed") Defendant*, 63 MINN. L. REV. 1, 2-3, 19-22 (1978).

7. *Id.* at 3, 19-20.

8. *Id.* at 1, 19-21, 25-27.

9. Dressler, *supra* note 1, at 344, 346, 353.

to choose his course of action, he is responsible for his blameworthy acts."¹⁰

Such choice might, however, be minimal; for instance, the choice to rob bank *A* or bank *B*. Dressler's examples exaggerate the degree to which the element of choice is available to a coercively persuaded actor—in each, the captor, after coercively indoctrinating the victim in a set of beliefs, steps back, leaving the victim completely free to choose the conduct by which these beliefs are to be expressed.¹¹ Such strained examples are unrealistic, for it is a defining feature of psychological totalism that the totalist demands of the victim *both* behavioral and attitudinal conformity.¹² These twin demands reinforce each other; the criminal acts serve to increase the psychological distance between the victim's past and present life, while the ideological indoctrination makes future criminal acts more acceptable to the victim.¹³

But even in Dressler's category of ideologically coerced defendants, I am prepared to assert that certain cases may merit a defense. If it were to appear in a given case that severe, irresistible psychological pressures produced attitudinal changes so great as to suggest that the choices made while in the altered state were not the victim's own, these choices would not be blameworthy.¹⁴ Responsibility must be personal.¹⁵ If an individual is forced to assume states of mind that are utterly inauthentic and foreign to his nature, he should not be punished for the actions that follow as a direct consequence from them.

Dressler also argues that, even if it is conceptually tenable, my proposal should be rejected because, compared to the benchmark defenses of duress and insanity, the moral case for exculpating coercively persuaded actors is weak.¹⁶ This is so, he says, because the coercively persuaded person suffers less choice reduction than the victim of duress or the defendant who is insane.¹⁷ I acknowledge that

10. *Id.* at 345.

11. *Id.* at 353 (polluter involuntarily indoctrinated in the "virtue of ecology," released, decides to kill human beings because they pollute the environment); *id.* at 353-54 (captive indoctrinated to believe homosexuality is immoral "then murders every homosexual he meets"); *see also id.* at 357 (inmate murders prison guard).

12. *See, e.g.,* R. LIFTON, *THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM* 67-70, 441 (1961); E. SCHEIN, *COERCIVE PERSUASION* 123-24 (1961); Delgado, *supra* note 6, at 4-5 & n.20.

13. *See* Delgado, *supra* note 6, at 8. *See generally* E. SCHEIN, *supra* note 12, at 54-56, 163-66.

14. Delgado, *supra* note 6, at 10-11, 19-22.

15. *See, e.g.,* W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* § 33, at 228 (1972) ("[T]he imposition of criminal liability for faultless conduct is contrary to the basic Anglo-American premise of criminal justice that crime requires personal fault on the part of the accused.").

16. Dressler, *supra* note 1, at 351-53, 358-59.

17. *Id.* at 354.

the brainwashed victim retains some degree of choice; so do many who are presently classified as insane.¹⁸ What I dispute is that the coercively persuaded actor's choice is his own.¹⁹ One who undergoes thought reform is often more deserving of a defense than the individual who acts while insane or under duress.²⁰ Persons who are insane may have earlier participated in their becoming insane.²¹ People are sometimes able to resist direct threats of death.²² In both these cases, moreover, there is at least the sense that one's self is involved. In coercive persuasion, it is the very self that is suppressed—if not demolished.²³

As a final line of attack, Dressler asserts that my defense lacks boundaries, that it is both underinclusive and overinclusive.²⁴ It is overinclusive, he says, because it lacks the clear lines of such "medical model" defenses as insanity and diminished capacity, or the objective quality of a physical threat, as in coercion.²⁵ As such, the defense will be unable to differentiate between individuals who have undergone coercive persuasion, and hence deserve a defense, and those who have not.

Dressler's faith in the medical model may be misplaced. At least with regard to insanity, the medical approach has come under withering attack for promising more than it can deliver.²⁶ Moreover, to the extent that medical or psychological testimony might be helpful to the court in a case of coercive persuasion, it will be readily available; the main works in the area of coercive persuasion have been produced

18. The American Law Institute's "substantial capacity" test is an explicit attempt to identify that degree of impairment of an actor's capacity to choose due to insanity which warrants exculpation. Total incapacity to conform to the requirement of the law is not required. See generally MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962); W. LAFAVE & A. SCOTT, *supra* note 15, § 38 at 292-93.

19. Delgado, *supra* note 6 at 10-11, 19-22.

20. *Id.* at 7-8 (comparison with moral status of person asserting defense of duress).

21. For the view that some insanity is a chosen response, see Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 S. CAL. L. REV. 527, 560-88 (1978). See generally T. SZASZ, *THE MANUFACTURE OF MADNESS* (1970).

22. See, e.g., Delgado, *supra* note 6, at 8.

23. For an excellent discussion of the ability of behavior control technologies to effect drastic changes in human subjects, see Note, *Conditioning and Other Technologies Used to "Treat?" "Rehabilitate?" "Demolish?" Prisoners and Mental Patients*, 45 S. CAL. L. REV. 616 (1972). See also Delgado, *Organically Induced Behavioral Change in Correctional Institutions: Release Decisions and the "New Man" Phenomenon*, 50 S. CAL. L. REV. 215 (1977).

24. Dressler, *supra* note 1, at 358-60.

25. *Id.* at 356.

26. See, e.g., T. SZASZ, *supra* note 21; Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 693 (1973); Morse, *supra* note 21.

by psychiatrists and psychologists.²⁷ Perhaps more importantly, cases of thought reform will often be recognizable without expert testimony. Those who have known the victim prior to his coercive persuasion will be able to testify to drastic changes, readily observable by lay persons.²⁸ Often, such changes will be so unmistakable that even without medical testimony the finder of fact may conclude that coercive persuasion has occurred.²⁹ The danger of overinclusiveness, then, is certainly no greater than with other mental defenses such as insanity, duress, or diminished capacity. In all likelihood it is considerably less.

Dressler's assertion of underinclusiveness is based on the assumption that the defense would be denied to persons, such as ghetto dwellers, who suffer extreme deprivation and poverty and whose choice, he believes, is reduced to as great a degree as is that of the coercively persuaded.³⁰ He fails to differentiate, however, between two distinct types of choice reduction. The first is simple choice reduction—a narrowing of the alternatives available to an actor with unimpaired capacity to choose among them. A second variety works through curtailment of the victim's *capacity* to choose. We exonerate persons in this latter category because their mechanisms of self-determination are so impaired that it is unreasonable to hold them responsible for their acts. Insanity, involuntary intoxication, and my proposed coercive persuasion defense fall into this category, whereas ghetto dwellers exhibit only simple choice reduction. Most ghetto crime takes place because of socioeconomic reduction of opportunity.³¹ Ghetto residents, in general, do not become insane or suffer diminished capacity; nor are they brainwashed or victims of thought reform. They may commit antisocial acts out of anger or desperation, or as political gestures. We may feel pity, anger at the conditions that caused such responses, or, if hardhearted, we may condemn them for not choosing starvation over crime. But our response, I suggest, is not that such persons are coercively persuaded—acting with superimposed mens rea.

By adding a number of significant details to Professor Dressler's

27. Some of the best known contributors to the field are Robert Jay Lifton, M.D., Professor of Psychiatry, Yale Medical School; Edward Schein, Professor of Psychology, Massachusetts Institute of Technology; Louis J. West, M.D., Chairman, Department of Psychiatry, University of California, Los Angeles; Margaret Thaler Singer, Department of Psychology, University of California, Berkeley; and Julius Segal, Psychologist, National Institute of Mental Health.

28. Delgado, *supra* note 6, at 22, 26-27.

29. *Id.* See also Delgado, *Religious Totalism: Gentle & Ungentle Persuasion Under the First Amendment*, 51 S. CAL. L. REV. 1, 69-71 (1977).

30. Dressler, *supra* note 1, at 358.

31. See generally PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 60-63 (1967).

example, however, it would be possible to construct a much closer case: A youth moves into a ghetto neighborhood dominated by vicious street gangs. To survive, he must join one or the other of the gangs. Membership is achieved through intensive indoctrination in gang values, including instant obedience to the gang leaders. The members are required to spend most of their time with the group, returning to the home only for meals and sleep. Violation of gang rules is punished by beatings or expulsion. Gang members are taught a code of conduct that includes robbery, arson, and hatred of adults.

Assume that such a youth is arrested for a crime committed as a result of his gang conditioning. Separated from the group while awaiting trial, the individual recants his gang affiliation. Appalled at his former actions, as well as at the mechanisms used by the group to induce him to carry them out, the accused seeks to interpose a defense of coercive persuasion. He assures the court that, if exonerated, he will leave his former associates and dedicate himself to a career of public service.

If a defense of coercive persuasion were established, should the hypothetical ex-gang member qualify? I suspect the answer is no.³² Nevertheless, the inquiry is an important one and should be pursued. Surely, one significant collateral benefit of allowing a coercive persuasion defense is that it fosters public discussion of the extent to which totalistic forces and groups operate in our society,³³ and of the effect their operations should have on criminal responsibility. We should not deny ourselves this benefit.

32. The moral case for exculpating such a defendant is weakened by the youth's ability to make the initial decision to join the gang. Moreover, a defense appears less appropriate because the conditioning process did not include the kind of intense, "abnormal" influences, such as starvation and sleep deprivation, usually associated with coercive persuasion cases. See Delgado, *supra* note 6, at 2, 13, 20.

33. Compare this view with that expressed in *United States v. Alexander*, 471 F.2d 923, 926 (D.C. Cir.) (Bazelon, J., for the court on first issue) (urging that public forum of trials can help focus attention on social conditions that make crime inevitable), *cert. denied*, 409 U.S. 1044 (1972).

